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November 30, 1995

BY COURIER

William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: RM-8416
MM Docket No. 94-29


Dear Mr. Caton:

Enclosed please find an original and four (4) copies of the corrected Petition for Reconsideration which Marysville Radio, Inc. and Roseville Radio, Inc. filed with the Commission on November 24, 1995. The corrections relate to typographical and other minor errors. It should be added that the attached Petition for Reconsideration does include the original Exhibit 1 which was referenced but not included in the petition filed last week.

I would appreciate it if you could file the original and three (3) copies and date-stamp the fourth copy for return to undersigned counsel. If the staff has any questions, the undersigned counsel should be contacted.

Sincerely,

Dickstein, Shapiro & Morin, L.L.P.
Attorneys for Marysville Radio,
Inc. and Roseville Radio, Inc.

By 
Lewis J. Paper
David B. Jepps

cc: Alan E. Aronowitz
All Counsel

Enclosures

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CORRECTED COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
Amendment of Section 73.202(b))	RM-8416
Table of Allotments FM)	MM Docket No. 94-29
Broadcast Stations (Willows)	
and Dunnigan, California))	

PETITION FOR RECONSIDERATION

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November 24, 1995

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Summary

Marysville Radio, Inc, and Roseville Radio, Inc. (whose predecessors-in-interest participated in earlier proceedings) seek reconsideration of the Bureau's Report and Order ("R&O") which amends the Table of Allotments to allow Pacific Spanish Network, Inc. ("PSN") to move KOSC(FM) (the "Station") from Willows to Dunnigan, California. The R&O is premised on (1) the provision of first local service to Dunnigan, (2) the availability of other distant aural services for Willows, and (3) the apparent absence of any intention by PSN to serve nearby Urbanized Areas. The R&O relies on incomplete facts and would otherwise represent an unjustified departure from established Commission policy.

First, the Commission has previously stated that the provision of a community's first local service should not necessarily assume priority over other public interest factors. In the instant case, Willows would lose its only night-time aural service and be left with a day-time-only AM station. Although Willows will have access to other distant aural services, the R&O does not provide any analysis to demonstrate that those other aural services provide an adequate signal or will provide programming responsive to the needs of the Willows service area.

Second, new information demonstrates that PSN does intend to serve much larger Urbanized Areas. A new engineering study --

based on actual coverage rather than the theoretical assumptions of Commission rules -- demonstrates that the contour authorized by the R&O would enable the Station to cover all of the Yuba City and Davis Urbanized Areas as well as significant portions of the Sacramento Urbanized Area. In addition, the media broker who facilitated the initial sale of the Station to PSN has filed an application for a new translator station to retransmit the Station's signal -- a retransmission that would enable the Station's signal to cover approximately 400,000 people in the Sacramento Urbanized Area. In short, the new facts demonstrate that PSN intends to serve larger metropolitan areas and hopefully secure advertising from the commercial establishments which abound in the Urbanized Areas.

Third, the R&O failed to apply the three criteria which the Commission established in deciding whether to grant preferences for first local service. Consideration of those three factors --- including Dunnigan's dependence on outside areas for services and facilities -- precludes any conclusion that the public interest would be better served by the complete loss of service to Willows and the reallocation of the Station to Dunnigan.

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FEDERAL COMMUNICATIONS COMMISSION
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Amendment of Section 73.202(b)) RM-8416
Table of Allotments FM) MM Docket No. 94-29
Broadcast Stations (Willows)
and Dunnigan, California))

TO: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Marysville Radio, Inc. ("MRI") and Roseville Radio, Inc. ("RRI"), acting pursuant to Section 1.106 of the Commission's rules, hereby petition for reconsideration of the Bureau's Report and Order ("R&O") in the above-referenced docket. Amendment of Section 73.202(b), DA 95-2149 (MMB October 24, 1995).

Introduction

The R&O represents a repudiation of the basic principles underlying the 1989 amendments to Section 1.420(i) of the Commission's rules. Those amendments were designed to promote better service to the public -- not to facilitate private gain at the expense of service to rural areas.

Unfortunately, the R&O would permit that very result. The R&O sidesteps the basic policy goals of Section 1.420(i) in a rush to judgment which cannot be justified by any practical

assessment of the public interest. Under the R&O, Pacific Spanish Network, Inc. ("PSN") will be allowed to completely abandon the Willows service area -- which has approximately 10,000 people -- to provide service to Dunnigan, a community of approximately 700 people. In the process, Willows will lose its only night-time aural service.

The availability of other aural services for Willows from distant stations cannot justify that complete loss of night-time service. This is especially so since Dunnigan is well served by many other aural services -- some of which are located in nearby communities that serve the interests of Dunnigan's small population.

The substantial discrepancy in the population of Willows -- which is being abandoned -- and Dunnigan -- which becomes PSN's new community of license -- illustrates the fundamental error of the R&O. Contrary to the Bureau's bold statement, a realistic assessment compels the conclusion that PSN does indeed intend to serve the much larger Urbanized Areas of Sacramento, Yuba City and Davis. An engineering analysis which relies on the actual topography of the area -- rather than the assumptions incorporated within the Commission's rules -- shows that PSN's move would enable its Station to reach all of Yuba City and Davis Urban Areas as well as approximately 170,000 persons within the Sacramento Urbanized Area. PSN would be able to reach a

substantial portion of the remainder of the Sacramento population -- approximately 225,000 more people -- through a translator station which PSN's media broker proposes to use to retransmit PSN's station.

In view of the foregoing new facts, the Bureau is obligated to make a more complete assessment as to whether PSN's move to Dunnigan would constitute a preferential arrangement -- an issue which should be resolved in the negative. A negative resolution of that issue, in turn, requires a reversal of the R&O and a recision of the accompanying amendment to the Table of Allotments.

I. Interest of MRI and RRI

MRI is currently the licensee of KSXX(FM) and KMYC(AM), which were previously licensed to River Cities Radio, L.P. RRI is the licensee of KRCX(FM), which was previously licensed to Fuller-Jeffrey Broadcasting of the Sacramento Valley. MRI's and RRI's respective predecessors-in-interest participated in prior proceedings in the above-referenced docket.

II. Facts

The R&O recites the facts underlying the decision and need not be repeated in detail. However, the more salient facts

-- including those which were not referenced in the R&O --
warrant exposition.

KIQS, Inc., the former licensee for KIQS(FM) (the "Station"), assigned the license for the Station to PSN on March 31, 1993. PSN thereby became the successor-in-interest to the petition which KIQS, Inc. had filed to upgrade the Station from a Class A to a Class B1 and to then move the Station from Willows to Dunnigan.

In granting the petition originally filed by KIQS, Inc., the R&O concluded that Dunnigan is a "community" for allotment purposes. R&O at ¶¶ 7-9. The R&O further concluded that the reallocation of the Station from Willows to Dunnigan constituted a preferential arrangement which justified the modification of the Station license under Section 1.420(i). R&O at ¶¶ 15-16.

In reaching that latter conclusion, the R&O relied on three principal factors. First, the R&O observed that "Dunnigan would receive a first local aural transmission service, which is priority three [under established allotment policies]." R&O at ¶ 15. Second, the R&O concluded that Willow's loss of its only night-time aural service was offset by Willow's access to "at least five-full time reception services," thereby making Willows a "well-served area." R&O at ¶ 16. And third, the R&O rejected the opponents' contention that PSN really intended to serve a

larger urban area -- a conclusion which relied on the R&O's observations that Dunnigan was neither in nor adjacent to an Urbanized Area and that the 70 dBu contour of the Station "does not cover any part of the Sacramento or nearby Yuba City urbanized areas." R&O at ¶ 16.

The R&O did not make any effort to determine the extent to which Dunnigan is dependent on nearby Urbanized Areas for employment or municipal services.

III. Argument

The R&O rests on incomplete facts and a misguided interpretation of Commission policy. If allowed to stand, the R&O would sanction the very situation which the full Commission warned against when Section 1.420(i) was amended in 1989 -- the flight of stations from rural, less populated areas to communities located near major metropolitan areas. Indeed, there is no prior decision by the full Commission which approved a move-in under circumstances comparable to those recited in the R&O.

The R&O's conclusion is even more suspect in light of new facts which were not present before the Bureau when it rendered the R&O: an engineering analysis which shows that the Station's 60 dBu contour would cover all of the Yuba City and Davis Urbanized Areas and a portion of the Sacramento Urbanized Area;

and a pending translator application by the media broker involved in the transaction which proposes to retransmit the Station signal to reach an even larger portion of the Sacramento area. Accordingly, the Bureau should reconsider the R&O and, upon such reconsideration, rescind its amendment of the Table of Allotments.

A. Applicable Standard

Section 307(b) of the Communications Act, as amended, 47 U.S.C. § 307(b), commands the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same." To that end, the Commission has adopted certain policies for the allocation of TV and FM stations in communities throughout the country. See Sixth Report and Order, 41 FCC 148 (1952); Revision of FM Assignment Policies and Procedures, 90 FCC2d 88 (1982). For FM stations, the order of priorities are (1) first full-time aural service, (2) second full-time aural services, (3) first local service, and (4) other public interest matters. However, if it made a proposal prior to 1989 to advance those priorities through a change in its community of license, an existing permittee or licensee faced the prospect of competing applications and a comparative hearing which the permittee or licensee might not win.

In June 1989, the Commission amended Section 1.420(i) to allow an FM or television station to specify a new community of license without facing competing applications. New Community of License, 4 FCC Rcd 4870 (1989). The Commission observed that its former procedure for specifying a new community "discourage[d] changes to the tables of allotments" and otherwise deterred a licensee or permittee "from seeking improvements to technical facilities that would require a modification of its community of license" 4 FCC Rcd at 4872.

The Commission initially discounted comments that the amendment to Section 1.420(i) would "facilitate abuses of process by rural licensees desiring to serve large urban areas." The Commission added, however, that it would "carefully monitor these situations, and will address the issue if necessary." 4 FCC Rcd at 4873. The Commission further stated that, in situations involving a change in community of license, it would "decide the proposal on a case-by-case basis, based on whether or not the proposed changes, taken as a whole, would advance our allotment priorities." 4 FCC Rcd at 4879 (footnote omitted).

Commissioner Quello dissented. He expressed concern that the Commission's amendment would enable broadcasters in rural communities to seek greater economic gains in more populous communities: "Experience tells me that we will begin to see a gradual movement from communities with limited populations and

low incomes to larger more economically advantageous communities." 4 FCC Fcd at 4877.

Commissioner Quello's concerns were prophetic, and certain proposed changes under the new rule generated considerable media attention. See "FCC May Block Gammon's Move Into Atlanta," Broadcasting (Nov. 5, 1990), p. 53. On reconsideration, the Commission therefore clarified the framework for analysis under the amended rule. New Community of License, 5 FCC Rcd 7094 (1990).

In response to the request of the National Association of Broadcasters ("NAB"), the Commission stated "unequivocally that Section 1.420(i) was adopted to further the Commission's long-standing pursuit of the goals underlying Section 307(b) of the [Communications] Act, and . . . any changes in the FM and TV Tables Allotments must be consistent with those goals." 5 FCC Rcd at 7095. The Commission also tried to allay the NAB's concern that the amendment "will result in the wholesale migration of stations from rural to urban areas . . ." The Commission stated as follows with respect to that latter issue:

Consistent with precedent, we do not intend to apply the first local service preference of our allotment criteria blindly. We recognize that an inflexible application of that preference, without further analysis, could consistently result in our finding that a reallocation leading to first local service for a suburb of a much larger adjacent metropolitan center justifies moving a local service from a more remote

community. We wish to dispel any concern that our new rule would lead to such a result.

In the [1989 Report and Order] we stated that the Commission's policy is to apply the allotment priorities in a flexible manner where circumstances warrant. It has never been Commission policy to adhere rigidly to the concept of localism if the result of that adherence is to undermine the fair, equitable, and efficient distribution of radio service mandated by Section 307(b) of the Communications Act. We have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's Section 307(b) related policies. We see no reason to depart now from this policy. . .

5 FCC Rcd at 7096 (emphasis added). In a footnote to the foregoing passage, the Commission cited as support four (4) decisions concerning the application of the Section 307(b) in comparative cases, including RKO General, Inc., 5 FCC Rcd 3222 (1990); Faye & Richard Tuck, 3 FCC Rcd 5374 (1988); and Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951). 5 Fcd at 7099 n.11.

In light of the Commission's clarification, Commissioner Quello withdrew his dissent. In a separate statement, he explained that he was "glad that, by this action, the Commission is taking steps to insure that changes in a community of license would truly serve our allotment priorities and will not deprive communities of local service." 5 FCC Rcd at 7099.

As the foregoing history make clear, acknowledgment of an area as a "community" does not necessarily justify a finding that a proposal to provide first local service to that community would constitute a "preferential arrangement." E.g., Ruarch Associates, 99 FCC2d 338, 339 (Rev. Bd. 1984), review denied, 101 FCC2d 1358 (1985) (the presumption in favor of first local service "does not result in an automatic preference and must be weighed against any countervailing factors"). There have been many occasions on which the Commission has refused to grant a preference in a comparative proceeding to a proposal to provide a community with its first local service. E.g., Ruarch Associates, supra (no preference granted for a proposal to serve a small community with no stations over a proposal to serve a community three times larger with one radio station); Santee Cooper Broadcasting Company of Hilton Head, Inc., 99 FCC 2d 781 (Rev. Bd. 1984) (no preference given to a proposal to serve a small community with no radio stations over a proposal to serve a much larger community with two radio stations). See generally Debra D. Carrigan, 100 FCC2d 721, 723-32 (Rev. Bd. 1985) (subsequent history omitted) (survey of case law under Section 307(b), including cases in which no preference granted for a proposed first local service).

In deciding whether to grant a preference for a first local service, the Commission has tried to honor the guiding

principles in Huntington Broadcasting Co. v. FCC, supra. In that case, the court affirmed a Commission decision that an applicant proposing to serve a suburb of Los Angeles could not receive a preference under Section 307(b) over a competing application which proposed Los Angeles as its community of license. The court relied on findings that each applicant "would substantially cover the entire metropolitan district in which both cities are located" and "that both applicants were offering to render mutually exclusively service to one great community. . ." 192 F.2d at 35. Huntington thus stands for the proposition that an applicant cannot receive a comparative preference under Section 307(b) by proposing a first local service to one community if the signal would in fact cover a large city.

The Commission subsequently clarified the criteria under which Huntington would be applied. The Commission determined that the Census Bureau's Urbanized Area concept would be "an appropriate definition of 'community' under Huntington. . ." Faye & Richard Tuck, supra, 3 FCC Rcd at 5379. The Commission then stated that, henceforth, it would consider only three criteria in deciding whether to apply Huntington: (1) the "size and proximity of a specified 'community' to the central city;" (2) the extent to which the signal would cover the same population; and (3) the interdependence between the proposed community and the urbanized area. 3 FCC recd at 5378-79. The Commission added

that "the relationship between the specified community and the central city is the critical consideration in deciding whether Huntington applies." 3 FCC Rcd at 5378.

To assist a determination on that last criterion, the Commission specified eight (8) factors that would be considered:

- (1) the extent to which community residents work in the larger metropolitan area rather than the specified community;
- (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests;
- (3) whether community leaders and residents perceive the specified community as being an integral part of , or separate from, the larger metropolitan area;
- (4) whether the specified community has its own local government and elected officials;
- (5) whether the smaller community has its own telephone book provided by the local telephone company or zip codes;
- (6) whether the community has its own commercial establishments, health facilities and transportation system;
- (7) the extent to which the specified community and the central city are part of the same advertising market; and
- (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries.

3 FCC Rcd at 5378.

In a subsequent case, the Commission determined that application of the foregoing factors precluded the grant of a

comparative preference to FM radio applicants who proposed to serve Richmond, California over applicants who proposed to serve San Francisco. The Commission found that (1) the Richmond applicants' signal population coverage was "identical with those of the San Francisco applicants;" (2) the criterion of size and proximity also weighted against a preference since Richmond "is one-ninth the size of San Francisco, and only 16 miles away;" and (3) consideration of the eight factors of interdependence precluded any finding that "Richmond is independent of the central cities of the San Francisco-Oakland metropolitan area." 5 FCC Rcd at 3223. The Commission reached this last conclusion despite evidence which showed that Richmond has a local government and elected officials, a full complement of municipal services, numerous and substantial commercial establishments, its own school district, its own telephone exchanges, and a "significant transportation and manufacturing center." 5 FCC Rcd at 3224.

In short, a Commission decision assessing the value of a first local service should not be based on a wooden recitation of facts which appear to justify a preference; rather, a Commission decision should be based on a realistic assessment of the service that would be rendered if a preference were granted. In the case of the Richmond applicants, the Commission recognized that their

service would, as a practical matter, be no different than the applicants who chose San Francisco as their community of license.

B. Dunnigan Is Not A Preferential Arrangement

A realistic -- as opposed to theoretical -- application of Commission policy requires reconsideration and rescission of the Bureau's decision to amend the Table of Allotments to allow PSN to move the Station to Dunnigan. Indeed, to preserve the R&O would be to approve the very approach which the Commission disclaimed on reconsideration: "the grant of a preference. . . to allow an artificial or purely technical manipulation of the Commission's Section 307(b) related policies." 5 FCC Rcd at 7096.

1. Size & Proximity to Urban Areas

Dunnigan is a tiny community which appears to be no more than a stopping point for people traveling elsewhere. Although Dunnigan is approximately 40 miles from Sacramento, the commuting time is relatively short because of the numerous interstate highways which provide direct access to the Sacramento urban area. Declaration of Jeff Holden, annexed hereto as Exhibit 1. In fact, it probably takes Dunnigan residents less time to travel those 40 miles than it would take Richmond residents to travel the 16 miles on congested roads and a few bridges to San Francisco.

2. Station Coverage

The R&O discounted any concern about PSN's intention to serve any urban area since the 70 dBu contour of the Station would not cover "any part of the Sacramento or nearby Yuba City urbanized areas." The R&O further observed that Dunnigan is not located adjacent to or in any urbanized area.

The R&O's analysis is fatally flawed. To begin with, it is of no significance, by itself, that Dunnigan is not located in or adjacent to any urbanized area. See Faye & Richard Tuck, supra, 5 FCC Rcd at 3224 (no preferential arrangement for proposed service to Richmond, which is located 16 miles from San Francisco). Nor is there any basis for the R&O's reliance on the 70 dBu contour of the Station; the more appropriate standard is the 60 dBu contour, which defines the reach of the Station's service area. On that latter point, it is noteworthy that the Station's signal would cover all of the Yuba City and Davis Urbanized Areas and approximately 10% of the Sacramento Urbanized Area.¹ The foregoing analysis is reinforced by the translator proposed by Brett E. Miller, the media broker who facilitated the assignment to PSN. See Exhibit 3 annexed hereto. Miller's proposed translator would retransmit the Station's signal to approximately 225,000 more people in the Sacramento Urbanized Area.

¹ As explained in the engineering analysis annexed hereto in Exhibit 2, the coverage analysis is based on actual rather than theoretical coverage. See 47 CFR § 313(i) and (j).

These latter facts -- which were not known to the Bureau before it rendered this decision -- confirm what should have been obvious from the beginning: PSN's real intention is to serve the Yuba City, Davis and Sacramento Urbanized Areas and not the tiny town of Dunnigan. One need not be a market analyst to recognize that there are very few commercial establishments in Dunnigan which can generate the kind of advertising revenues needed to support the Station. PSN's obvious hope and intention is to capture advertising revenues from the much larger commercial establishments which abound in the Sacramento, Davis and Yuba City Urbanized Areas.

3. Dunnigan's Dependence On other Areas

The R&O made no attempt to address Dunnigan's interdependence with the Yuba City, Davis and Sacramento Urbanized Areas. Nor did the R&O offer any explanation for that omission. In view of Dunnigan's small size and PSN's apparent intention to serve Urbanized Areas, that analysis is required -- especially since it would demonstrate Dunnigan's dependence on other communities for every major service:

(a) There is no evidence in the record concerning the extent to which Dunnigan residents work in the surrounding metropolitan areas, but it is obvious that very few work in Dunnigan itself. There are only a handful of small commercial establishments in Dunnigan, and common sense would dictate that Dunnigan residents would have to find work elsewhere. The tentative county plan for Dunnigan -- upon which PSN places

so much relevance -- confirms Dunnigan's reliance on Urbanized Areas for employment: "Because Dunnigan is far from large job centers, new residents would likely commute to Woodland or Sacramento." KIQS, Inc., Petition for Rulemaking (Dec. 22, 1993), Ex. B at II-2.

(b) Dunnigan does not have its own newspaper or any other independent media from the community that covers the community's local needs and interests.

(c) Dunnigan does not have its own local government and elected officials.

(d) The R&O assumed that the Dunnigan residents "have a strong belief in the existence of a community" because Dunnigan has its own post office, zip code, fire department, and churches, some of which have Dunnigan in their names. R&O at ¶ 8. However, the fact that a few facilities use the name Dunnigan does not mean that residents view Dunnigan as an island unto itself rather than part of a larger metropolitan area. This is especially so since there is no newspaper or other town activity which would draw residents together.

(e) Dunnigan does not have a local telephone book (although it does have its own post office and zip code).

(f) Dunnigan only has limited commercial establishments, health facilities, and transportation systems. Businesses are few and small; the only health facilities consist of an emergency medical team provided by the fire department -- there being no stand alone hospital or other clinic; and there is no independent transportation system.

(g) PSN does not dispute that Dunnigan is part of the Sacramento ADI and therefore part of the same advertising market. See PSN, Reply Comments of Petitioner (June 21 1994) at 10 n. 28.

(h) Dunnigan must rely on the larger Sacramento, Davis and Yuba City Urbanized Areas for many vital municipal services, including police, schools, libraries, hospitals, and roads.²

In general, Dunnigan is far more dependent on urban areas for commercial and municipal services than Richmond. Richmond had its own school system, telephone exchanges, substantial commercial establishments, hospitals and public transportation systems. If the presence of those facilities and services was insufficient to distinguish Richmond from the San Francisco - Oakland Urbanized Area, then it cannot be reasonably concluded that Dunnigan is independent of the Yuba City, Sacramento or Davis Urbanized Areas.

4. Access to Aural Services

Instead of focusing on the factors delineated by the Commission, the R&O focuses on the availability of other aural services to Willows. The R&O claims that the loss of the Willow's night-time local service can be offset by the availability of distant aural services.

In effect, the R&O proposes what the Commission said it would not do: "adhere rigidly to the concept of localism. . ."
 5 FCC Rcd at 7096. The R&O's reliance on Dunnigan's alleged local needs is all the more dubious in light of (a) PSN's obvious

² Most of the foregoing facts are attested to in the declaration of Margaret Frick, annexed hereto as Exhibit 4.

intention to serve the larger Sacramento, Davis and Yuba City Urbanized Areas and (b) the R&O's complete failure to determine the extent to which -- if at all -- those distant aural services provide programming responsive to the needs of the Willows service area.³

Conclusion


WHEREFORE, in view of the foregoing, it is respectfully requested that the Bureau reconsider its decision and rescind the amendment to the Table of Allotments.

Respectfully submitted,

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³ The R&O not only flies in the face of the full Commission's assurances concerning the preservation of local service; the R&O also runs counter to the Commission's efforts to revitalize the radio industry through the 1992 amendments to the ownership rules. Revision of Radio Rules and policies, 7 FCC Rcd 2755 (1992). Those amendments -- including an expansion of the number of stations that can be attributed to a single party in a particular market -- were designed to combat the financial distress overwhelming radio stations in markets throughout the country, including Sacramento. The R&O now proposes to allow yet another radio station into the crowded Sacramento market. That result might serve PSN's private economic interests, but it cannot be squared with the Commission's prior statements or a common sense approach to the real public interest.

PETITION FOR RECONSIDERATION

EXHIBIT 1